Bookbinder's Seafood House, Inc. *and* Hotel Employees and Restaurant Employees International Union, Local 274, AFL–CIO. Case 4–CA–31659

October 20, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The General Counsel seeks a default judgment[1] in this case on the ground that the Respondent has failed to file an answer to the complaint. Based on a charge filed by Hotel Employees and Restaurant Employees International Union, Local 274, AFL–CIO on October 15, 2002, the General Counsel issued a complaint on December 16, 2002, against Bookbinder's Seafood House, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On February 13, 2003, the General Counsel filed a Motion for Summary Judgment with the Board. On February 21, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively noted that unless an answer was filed by December 30, 2002, all the allegations in the complaint would be considered admitted. Further, the undisputed allegations in the motion disclose that the Region, by letter dated January 27, 2003, notified the Respondent that unless an answer was received by February 3, 2003, a motion for default judgment would be filed. Nevertheless, the Respondent did not file an answer to the complaint.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's motion for default judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, has been engaged in the operation of a restaurant at 215 South 15th Street, Philadelphia, Pennsylvania. During the calendar year preceding issuance of the complaint, the Respondent, in conducting its business operations, derived gross revenues in excess of $500,000 and purchased and received goods at its Philadelphia facility valued in excess of $5000 directly from points outside the Commonwealth of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Richard Bookbinder has been the Respondent's vice president and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time cooks, pantry employees, dishwashers, oyster bar employees and bartenders employed at the Restaurant.

At all material times, the Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit described above. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from November 1, 1995, to November 7, 1998, which was extended until November 7, 2001 (the agreement).

At all material times since at least November 1, 1995, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since about September 13, 2002, the Respondent has failed and refused to meet with the Union to bargain for a collective-bargaining agreement to succeed the agreement.

Since about October 1, 2002, the Respondent has failed to pay wages due to unit employees.

Since about April 16, 2002, the Respondent has failed and refused to make welfare and pension contributions to funds set forth in article XIX of the agreement.

[1] The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file an answer to the complaint. Accordingly, we construe the General Counsel's motion as a motion for default judgment.

Since about October 1, 2002, the Respondent has discontinued its practice of providing additional compensation to certain "front of the house" unit employees to enable them to purchase health insurance.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective bargaining. The Respondent engaged in the conduct described above without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing to bargain collectively and in good faith with the exclusive bargaining representative of its employees since September 13, 2002, we shall order it to bargain with the Union with respect to wages, hours, and other terms and conditions of employment of the unit's employees and, if an understanding is reached, embody the understanding in a signed agreement.

Having found that the Respondent has also violated Section 8(a)(5) and (1) by failing to pay wages due to unit employees since October 1, 2002, we shall order the Respondent to make the unit employees whole for any loss of earnings suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, having found that the Respondent has violated Section 8(a)(5) and (1) since April 16, 2002, by failing and refusing to make welfare and pension contributions to funds set forth in article XIX of the agreement, we shall order the Respondent to honor the terms and conditions of the agreement, until a new agreement or good-faith impasse in negotiations is reached, and to make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of Respondent's unlawful conduct. Further, we shall order the Respondent to make all required welfare and pension contributions that have not been made on behalf of the unit employees since April 16, 2002, including any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).[2] Respondent shall also be required to reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), affd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, having found that the Respondent has violated Section 8(a)(5) and (1) since October 1, 2002, by unilaterally discontinuing its practice of providing additional compensation to certain "front of the house" unit employees to enable them to purchase health insurance, we shall order the Respondent to restore this practice and make whole employees for any resulting loss of earnings and other benefits. Respondent shall also be required to reimburse employees for any expenses ensuing from its failure to provide the additional compensation for health insurance, as set forth in *Kraft Plumbing & Heating*, supra. Backpay shall be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Bookbinder's Seafood House, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Hotel Employees and Restaurant Employees International Union, Local 274, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the following unit:

[2] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Employer's delinquent contributions during the period of delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[3] We leave to compliance the issue of whether employees could have avoided these expenses, and thereby mitigated damages, by expending available personal assets to purchase medical insurance. However, we do not pass, at this juncture, on whether this factor, if shown, would negate or minimize the monetary remedy.

All full-time and regular part-time cooks, pantry employees, dishwashers, oyster bar employees and bartenders employed at the Restaurant.

(b) Failing to pay wages due to unit employees.

(c) Unilaterally failing and refusing to make welfare and pension contributions to funds set forth in article XIX of the November 1, 1995—November 7, 1998 collective-bargaining agreement, which was extended until November 7, 2001.

(d) Unilaterally discontinuing its practice of providing additional compensation to certain "front of the house" unit employees to enable them to purchase health insurance.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the unit employees concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Make the unit employees whole, with interest, for any loss of earnings suffered as a result of the Respondent's unilateral failure to pay them their wages since October 1, 2002, in the manner set forth in the remedy section of this decision.

(c) Honor the terms and conditions of the November 1, 1995—November 7, 1998 collective-bargaining agreement, which was extended until November 7, 2001, until a new agreement or good faith impasse in negotiations is reached, and make the unit employees whole, with interest, for any loss of earnings and other benefits they may have suffered as a result of Respondent's failure and refusal to make welfare and pension contributions to funds set forth in article XIX of the agreement since April 16, 2002, in the manner set forth in the remedy section of this decision.

(d) Make all required welfare and pension contributions to funds set forth in article XIX of the agreement that have not been made since April 16, 2002, and reimburse the unit employees for any expenses resulting from its failure to make the required contributions, with interest, in the manner set forth in the remedy section of this decision.

(e) Restore the practice of providing additional compensation to certain "front of the house" unit employees to enable them to purchase health insurance, and make employees whole, with interest, for any loss of earnings and other benefits suffered, and expenses incurred, as a result of the Respondent's failure to continue this practice since October 1, 2002, in the manner set forth in the remedy section of this decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix".[4] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 16, 2002.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 20, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with Hotel Employees and Restaurant Employees International Union, Local 274, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the following unit

All full-time and regular part-time cooks, pantry employees, dishwashers, oyster bar employees and bartenders employed at the Restaurant.

WE WILL NOT fail to pay wages due to unit employees.

WE WILL NOT unilaterally cease making welfare and pension contributions to funds set forth in article XIX of our November 1, 1995—November 7, 1998 collective-bargaining agreement with the Union, which was extended to November 7, 2001.

WE WILL NOT unilaterally discontinue our practice of providing additional compensation to certain "front of the house" unit employees to enable them to purchase health insurance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of unit employees concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL make the unit employees whole, with interest, for any loss of earnings suffered as a result of our unilateral failure to pay them their wages since October 1, 2002.

WE WILL honor the terms and conditions of the November 1, 1995—November 7, 1998 collective-bargaining agreement, which was extended until November 7, 2001, until a new agreement or good faith impasse in negotiations is reached, and WE WILL make the unit employees whole, with interest, for any loss of earnings and other benefits they may have suffered as a result of our failure and refusal to make welfare and pension contributions to funds set forth in article XIX of the agreement since April 16, 2002.

WE WILL make all required welfare and pension contributions to funds set forth in article XIX of the agreement that have not been made since April 16, 2002, and WE WILL reimburse the unit employees for any expenses resulting from our failure to make the required contributions, with interest.

WE WILL restore the practice of providing additional compensation to certain "front of the house" unit employees to enable them to purchase health insurance, and WE WILL make employees whole, with interest, for any loss of earnings and other benefits suffered, and expenses incurred, as a result of our failure to continue this practice since October 1, 2002.

BOOKBINDER'S SEAFOOD HOUSE, INC.